FRANKLIN REAL ESTATE CO.

IBLA 85-692 Decided August 29, 1986

Appeal from a decision of the Colorado State Office, Bureau of Land Management, declaring that coal lease C-012894 will be readjusted.

Affirmed.

1. Coal Leases and Permits: Leases -- Coal Leases and Permits: Readjustment -- Rules of Practice: Appeals: Standing to Appeal

   Where BLM sends a Federal coal lessee a notice of readjustment stating that its lease will, in fact, be readjusted and that the terms and conditions of readjustment will be forwarded within 2 years of receipt of the notice, the lessee may protest that notice and an appeal will lie from a decision denying that protest because the lessee is a party to a case who has been adversely affected by BLM's decision.

2. Coal Leases and Permits: Leases -- Coal Leases and Permits: Readjustment

   For purposes of coal lease readjustment periods, any coal lease issued prior to enactment of the Federal Coal Leasing Amendments Act of August 4, 1976, 30 U.S.C. §§ 201, 209 (1982), whose 20-year readjustment period expires after August 4, 1976, is automatically converted at that time to a 10-year readjustment interval. Failure to provide timely notice of readjustment means that the Department waives the right to impose any other new terms and conditions on the lease until the end of the next 10-year readjustment period.

APPEARANCES: Hugh C. Garner, Esq., Judith S. H. Atherton, Esq., and William G. Stehlin, Esq., Salt Lake City, Utah, for appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Franklin Real Estate Company (Franklin) appeals from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated May 13, 1985,

in which it restated its position that appellant's coal lease C-012894 would be subject to readjustment on December 1, 1986, in accordance with section 3(d) of the lease and 43 CFR 3451.1(a)(1), the Departmental regulation providing for readjustment of lease terms.

Coal lease C-012894 was issued effective December 1, 1956, to Edward Lasnik pursuant to section 7 of the Mineral Leasing Act (MLA) of 1920, 30 U.S.C. § 207 (1952), for an "indeterminate period." The lease contains 634.42 acres in T. 5 N., R. 89 W., sixth principal meridian, Routt County, Colorado. Lasnik assigned the lease to Charles L. and Paul J. Silengo who assigned it to appellant. The assignment to appellant was approved effective June 1, 1975. In 1976, the Federal Coal Leasing Amendments Act (FCLAA), 30 U.S.C. §§ 201-209 (1982), was enacted imposing new or additional requirements on Federal coal leases when issued or readjusted.

By decision of August 2, 1979, BLM notified appellant that lease C-012894 was subject to the readjustment of terms and conditions on December 1, 1976. Appellant objected to the notice, arguing that BLM had no right to readjust the lease 2-1/2 years after its anniversary date. BLM treated the objection as a protest, and in a decision dated December 3, 1981, dismissed the protest and readjusted the lease. Franklin appealed and the Board in accordance with the judicial mandate of Rosebud Coal Sales Co. v. Andrus (Rosebud), 667 F.2d 949 (10th Cir. 1982), and California Portland Cement Co. v. Andrus (Portland), 667 F.2d 953 (10th Cir. 1982), vacated BLM's decision to readjust lease C-012894 finding BLM's notice of readjustment was untimely. Franklin Real Estate Co., 71 IBLA 13 (1983).

On April 7, 1983, BLM sent a notice to appellant which included the following statement:

As a result of the above-cited IBLA decision, coal lease C-012894 will continue with the same terms and conditions as issued December 1, 1956, including the royalty provisions of 15 cents on every ton of 2,000 pounds of coal mined. Pursuant to regulation 43 C.F.R. 3451.1(a)(1), this lease is subject to readjustment on December 1, 1986.

Appellant did not respond to this notice. On December 28, 1984, BLM, relying on 30 U.S.C. § 207(a) (1982) and 43 CFR 3451.1(a)(1) (1984), informed appellant by a notice of "Lease Terms and Conditions to be Readjusted," that its lease was subject to readjustment on December 1, 1986 and stated that "the terms and conditions of the lease [C-012894] . . . will be readjusted." BLM further stated in the notice that "[a] notice containing the proposed readjusted terms and conditions will be forwarded to you within two years of your receipt of this notice."

On March 19, 1985, appellant wrote BLM expressing its concern over BLM's notice of intent to readjust the lease terms as of December 1, 1986. Appellant contended that its lease was not due to be readjusted until December 1, 1996, based on its interpretation of 43 CFR 3451.1(a)(1). That

regulation, effective July 19, 1979, states that "[a]ll leases issued prior to August 4, 1976, shall be subject to readjustment at the end of the current 20-year period and at the end of each 10-year period thereafter." (Emphasis supplied.) Although originally due for readjustment as of December 1976, appellant pointed out that the lease was not readjusted at that time, and, consequently, the lease's second 20-year term began to run as of that date. Appellant contended that the second 20-year term was in effect at the time 43 CFR 3451.1(a)(1), was promulgated, thus making it the "current 20-year period."

Following further exchange of correspondence on this subject, BLM issued its decision of May 13, 1985. Therein, BLM referred to the Board's disposition of the appeal of Utah International, Inc., IBLA 84-807. That appeal, which involved a situation similar to appellant's, was dismissed without prejudice by the Board's order of December 31, 1984. BLM quoted the Board's statement that "appellants cannot at present allege facts showing that they are adversely affected." BLM stated that Franklin "appears to be in a similar position as IBLA considers our notice of intent to readjust a coal lease 'a non-binding expression' of the time at which a readjustment might occur." BLM reiterated its decision that coal lease C-012894 is subject to readjustment on December 1, 1986, and would be readjusted at that time in accordance with section 3(d) of the lease and 43 CFR 3451.1(a)(1).

Franklin has sought review of that May 13, 1985, decision. It contends that BLM's decision that its lease is subject to readjustment as of December 1, 1986, is ripe for appeal under 43 CFR 4.410(a). Regarding the substance of the appeal, appellant asserts that section 207(a) of FCLAA, which creates a 20-year primary term with subsequent 10-year readjustment intervals thereafter for leases issued after its passage, applies only to post-FCLAA leases. As for the regulations issued pursuant to FCLAA, appellant admits that 43 CFR 3451.1(a)(1) does apply to pre-FCLAA leases, but it interprets 43 CFR 3451.1(a)(1) to mean that its lease is subject to readjustment at the end of the current 20-year period, which, it argues, would be December 1, 1996. Appellant explains that its lease was subject to readjustment at the expiration of its first 20-year readjustment interval, December 1, 1976. Since BLM did not readjustment at that time, appellant contends that the lease's second 20-year interval began on December 1, 1976. Appellant asserts that this second 20-year period is the current 20-year period, as provided by 43 CFR 3451.1(a)(1), and that consequently the lease is not subject to readjustment until December 1, 1996.

Appellant further contends that by selectively imposing new lease term provisions outside of regularly scheduled readjustment periods, BLM has violated express congressional and administrative policy to the contrary. The imposition of a 10-year readjustment period, according to appellant, is a breach of contract because BLM has readjusted section 3(d) of the lease which provides for 20-year readjustment intervals. Appellant explains that BLM waived the right to readjust the lease in 1976, and, therefore, the terms and conditions cannot be changed until the next scheduled readjustment, 1996. Appellant asserts that in readjusting section 3(d) of the lease, by altering

20-year readjustment intervals to 10-year readjustment intervals, BLM has breached its contractual obligation to readjust only at the end of specifically agreed intervals of 20 years.

Appellant contends that BLM's decision to readjust the lease as of December 1, 1986, disregards the court's ruling in Rosebud, supra, and Portland, supra, and the Board's decision in Franklin Real Estate Co., supra, because BLM's imposition of the 10-year interval readjusts section 3(d) of the lease and thereby violates the rulings of the court, as well as the Board.

In its answer, BLM cites court and Board decisions holding that the FCLAA does apply to leases issued prior to the enactment of the law. Responding to the appellant's contention that BLM waived its right to readjust the lease in December 1976, BLM states that the law specifically provides that subsequent readjustment periods must be at 10-year intervals and that the Secretary has no authority to waive or ignore that specific provision.

BLM distinguishes Rosebud, supra, and Portland, supra, by pointing out that those cases involved leases which became subject to readjustment prior to FCLAA, and, therefore, there was no statute requiring 10-year readjustment periods. BLM states that its decision to readjust the lease is not inconsistent with Franklin Real Estate Co., supra, which denied BLM the right to readjust Franklin's lease as of December 1, 1976. BLM explains that a review of that decision reveals that the Board did not consider the impact of section 6 of FCLAA, insofar as the length of subsequent readjustment periods is concerned.

In reply to BLM's answer, appellant refers to BLM's statement that the Secretary must impose the terms of FCLAA to leases readjusted after enactment of FCLAA. Appellant contends that the terms of FCLAA must be imposed only upon timely readjustment.

Subsequently, in an amendment to its statement of reasons, appellant refers to section 3(d) of the lease which provides that the lessor shall have the right to readjust terms and conditions at the end of 20 years from the date of the lease and thereafter at the end of each succeeding 20-year period during the continuance of the lease "unless otherwise provided by law at the time of the expiration of any such periods." (Emphasis added.) Appellant points out that in order to support its decision to readjust the lease in 1986 rather than 1996, BLM is assuming that the "unless otherwise provided by law" language causes all statutes and amendments existing upon the date of lease readjustment to be automatically incorporated into the lease, regardless of whether BLM has actually exercised its option to readjust. Appellant points out that this interpretation of FCLAA was rejected by the United States District Court for the District of Utah in Coastal States Energy Co. v. Watt, 629 F. Supp. 9 (1985).

BLM responded by stating that the law in effect at the time of readjustment has not taken the right to readjust away, but has directed the

Secretary to readjust at the end of a lease's initial term and impose a mandatory 10-year readjustment period.

[1] At the outset we will discuss BLM's reference to the Board's December 31, 1984, order in Utah International, Inc., IBLA 84-807. BLM noted that in Utah International the Board held that the appellants could not allege facts showing that they were adversely affected, as required by 43 CFR 4.410. It stated that Franklin was in a similar position. We find that Utah International is distinguishable from the present case.

In Utah International, the Board stated:

> Examination of the present facts reveals that BLM's notice of August 3, 1982, did not state that readjustment would occur in 1988 and did not set forth the actual readjusted lease terms. BLM's notice was, at most, a nonbinding expression that 1988 would be the earliest time at which a readjustment might occur. [Emphasis added; footnote omitted.]

In that regard the notice to Utah International was similar to that given to Franklin in April 1983. At that time BLM informed Franklin that its lease was "subject to readjustment on December 1, 1986." Franklin did not seek review of that notice and, if it had, the appeal would have been subject to dismissal for the same reasons as set forth in our Utah International order.

The December 28, 1984, notice, on the other hand, stated:

> Notice is hereby given that the terms and conditions of the lease will be readjusted in accordance with the Mineral Leasing Act, as amended, and the provisions of 43 CFR 3451. A notice containing the proposed readjustment terms and conditions will be forwarded to you within two years of your receipt of this notice. [Emphasis added.]

This notice expressly stated the lease would be readjusted and, in accordance with 43 CFR 3451.1(c)(2), the proposed terms and conditions would be forwarded within 2 years of receipt of the notice. Thus, the December 28, 1984, notice is distinguishable from the April 1983 notice and from the notice in the Utah International case, since those notices merely set forth the earliest date at which the leases would be subject to readjustment. The December 28, 1984, notice definitely informed Franklin that its lease would be readjusted effective December 1, 1986. That proposed action was subject to protest by Franklin. See 43 CFR 4.450-2. On March 21, 1985, Franklin expressed its objection to the December 1, 1986, readjustment date and on May 13, 1985, BLM essentially dismissed that objection. We find that Franklin is a party to a case who has been adversely affected by BLM's decision within the meaning of 43 CFR 4.410. Utah International is not controlling.

The sole substantive issue for consideration is whether Federal coal lease C-012894, which was not readjusted by BLM at the end of its 20-year period, December 1, 1976, is subject to readjustment on December 1, 1986, as claimed by BLM, or on December 1, 1996, as asserted by Franklin.

At the time the lease was issued, section 7 of the Mineral Leasing Act of 1920, 30 U.S.C. § 207 (1952), provided:

> Leases shall be for indeterminate periods upon condition * * * that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods.

Section 3(d) of the lease provides:

> The lessor reserves the following rights:
>
> * * * * * * *
>
> (d) Readjustment of terms. -- The right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period.

In 1976, section 7 of the MLA was amended by section 6 of FCLAA, 30 U.S.C. § 207(a) (1982), to read in pertinent part as follows:

> A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. * * * The lease shall include such other terms and conditions as the Secretary shall determine. Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.

Thus, prior to the enactment of FCLAA, Federal coal leases were issued for an indeterminate duration subject to 20-year readjustment intervals. FCLAA changed that to provide that leases would issue with 20-year primary terms subject to readjustment at the end of that term and at the end of each 10-year period thereafter, as long as the lease was extended. FCLAA itself did not specifically address the status of coal leases issued prior to its enactment. However, in regulations promulgated July 19, 1979, the Department stated that all leases issued prior to August 4, 1976 (pre-FCLAA leases), would be subject to readjustment at the end of the "current 20-year period

and at the end of each 10-year period thereafter." 43 CFR 3451.1(a)(1). The same regulation provides that leases issued after August 4, 1976 (post-FCLAA leases), will be subject to readjustment at the end of the first 20-year period and each 10-year period thereafter.

Franklin, therefore, argues that when BLM failed to readjust its lease in 1976, the lease automatically commenced a second 20-year term in accordance with section 3(d) of the lease and that the second 20-year period was the "current" 20-year term at the time the regulations were promulgated. BLM contends, however, that while the Secretary has some discretion in readjusting terms and conditions of a coal lease at the expiration of its 20-year period, that discretion is limited where "the law specifically directs that a term be included." BLM Answer at 6. BLM claims the Secretary has no discretion in imposing the December 1, 1986, readjustment date because "[t]he law specifically provides that subsequent readjustment periods must be at 10-year intervals." BLM Answer at 6. The Secretary cannot ignore or waive that provision, BLM argues. It cites two Board decisions in support of its argument, Coastal States Energy Co., 70 IBLA 386, 391 (1983) and Lone Star Steel Co., 65 IBLA 147, 150 (1982).

Those cases cited by BLM state that BLM is required to impose those terms and conditions required by statute or regulation. Both of those cases, however, involved situations in which BLM had made timely readjustments. What the Board's decisions indicated was that arguments concerning terms and conditions required by law must be rejected because the imposition of such terms and conditions is mandatory where BLM has provided timely notice of readjustment. As noted above, BLM's notice of readjustment in 1979 was not timely.

While we find Franklin's arguments regarding the "current 20-year period" to be appealing, they do not withstand close scrutiny. The Board has held that failure to provide notice of readjustment prior to the end of the 20-year lease term constitutes a waiver of the right to readjust. Franklin Real Estate Co., supra; Kaiser Steel Corp., 63 IBLA 363 (1982). We have also stated, however, that waiver of the right to readjust relates only to the readjustment period in question, and the Department may readjust the lease at the "next appropriate period" in accordance with procedural guides then in existence. Consolidation Coal Co., 87 IBLA 296, 303 (1985). We must now determine what the "next appropriate period" is.

[2] In our analysis we look first to the language of FCLAA, but it provides no guidance concerning the readjustment period for pre-FCLAA leases. Next, we turn to the legislative history of that Act. There we find the remarks of Representative Patsy T. Mink, Chairman of the Subcommittee on Mines and Mining of the House Committee on Interior and Insular Affairs, who stated:

> In summary, Mr. Chairman, let me emphasize that the provisions of H.R. 6721 are intended to correct the inadequacies of

> present law which permit the speculative holding of leases and provide a poor return to the public. The 533 existing Federal leases would be unaffected by the bill except to the extent its provisions are made applicable upon the periodic ten year readjustment of lease terms, or upon the inclusion of an existing lease in a logical mining unit. [Emphasis added.]

122 Cong. Rec. 489 (1976). This statement is a clear expression of Congressional intent that pre-FCLAA leases be subjected to the periodic 10-year readjustment of lease terms.

Following enactment of FCLAA, the Department issued proposed rulemaking on October 15, 1976, 41 FR 45573, addressing the readjustment period for coal leases as follows:

> (6) 43 CFR 3522.2-1 is amended to read as follows:
>
> § 3522.2-1 Terms and conditions.
>
> * * * * * * *
>
> (b) Coal. All coal leases will be subject to readjustment at the end of the first 20-year period following the issuance of the lease and at the end of each ten-year period thereafter.

This regulation did not distinguish between pre-FCLAA and post-FCLAA leases. Also it failed to recognize that at the time of its issuance some coal leases were in 20-year periods beyond their first. However, the regulation was adopted without change or comment in final rulemaking published December 29, 1976. 41 FR 56646.

Subsequently, the Department proposed more comprehensive rules to govern coal lease readjustments. 44 FR 16800 (March 19, 1979). The proposed rulemaking included the language of 43 CFR 3451.1(a):

> All leases issued prior to August 4, 1976, shall be subject to readjustment at the end of the current 20-year period and at the end of each 10-year period thereafter. All leases issued after August 4, 1976, shall be subject to readjustment at the end of the first 20-year period and each 10-year period thereafter, if the lease is extended.

44 FR 16832 (March 19, 1979). The preamble contained no explanation of this language and no explanation was included in the final rulemaking which contained the same language at 43 CFR 3451.1(a)(1). 44 FR 42635 (July 19, 1979).

Franklin argues that in July 1979 it was in its second 20-year period, and, thus, its "current" 20-year period does not expire until December 1,

1996. However, we construe the Department's regulations to be consistent with the express Congressional intent that pre-FCLAA leases be converted to 10-year readjustment periods. When the Department published the regulations in 1979, it assumed that all pre-FCLAA leases whose 20-year terms had expired after August 4, 1976, would be subject to readjustment. 1/ Thus, the reference to "current 20-year period" evidenced an intent to include therein only the 20-year lease periods in effect at the time FCLAA was enacted. Any pre-FCLAA lease whose 20-year period expired after August 4, 1976, would be subject to readjustment on that date and at the end of each 10-year period thereafter. The fact that this Board held in 1983 that BLM waived its right to readjust C-012894, when it failed to give timely notice of readjustment in 1976, does not mean that C-012894 may escape readjustment for another 20 years.

We find that it was the intent of Congress that pre-FCLAA leases be converted to 10-year readjustment periods at the time of the expiration of the lease period in effect on August 4, 1976. At the time of passage of FCLAA, C-012894 was in its first 20-year period. When that period expired December 1, 1976, C-012894 automatically converted to a 10-year readjustment schedule. Although the readjustment of all other terms and conditions was waived, BLM was entitled to readjust C-012894 at the expiration of the 10-year readjustment period upon timely notice.

1/ Those regulations, published on July 19, 1979, 44 FR 42635, contained the following provision:

"The authorized officer shall notify the lessee whether or not any readjustment of terms and conditions is to be made. If feasible, the authorized officer shall so notify the lessee of any lease which becomes subject to readjustment prior to June 1, 1980, before the expiration of the current 20-year period."

43 CFR 3451.1(b) (1979).

At the time, the Departmental policy concerning readjustment was set forth in the preamble to the rulemaking, wherein the Department stated:

"Comments received from industry objected to the Department of the Interior's assertion of the authority to readjust when the lessee was not so notified at the 20-year anniversary date * * *. The Secretary of the Interior, acting through the Board of Land Appeals, has reaffirmed the Bureau of Land Management's authority to make such readjustments, California Portland Cement Co., 40 IBLA 339 (May 10, 1979), [reversed, Portland, supra] and it is the Department's policy to proceed with these readjustments.

"Several industry comments also objected to section 3451.1(b), which is consistent with the readjustment policy discussed above, and applies to leases with anniversary dates between August 4, 1976, and June 1, 1980. As evidenced by section 3451.1(d), the Department of the Interior is meeting the concern behind the industry objections by providing that beginning with June 1, 1980, failure to notify the lessee of readjustment prior to the readjustment anniversary date will constitute a waiver of the right to readjust. In turn,

Franklin also directs our attention to Coastal States Energy Co. v. Watt, 629 F. Supp. 9 (D. Utah 1985), stating that therein the court specifically rejected BLM's contention that the language "unless otherwise provided by law at the time of expiration of any such period," included in the leases in that case (and also in the lease herein), automatically incorporates existing statutes into leases subject to readjustment.

The court stated at 20:

> The Secretary argues that the lease provision, 'unless otherwise provided by law at the expiration of any such period,' allows the BLM to include the royalty provisions of the FCLAA in a lease at the time of readjustment. The court disagrees. The 'unless otherwise provided by law' language modifies the right to readjust. In other words, the Secretary has the right to readjust unless the law in effect at the time of readjustment has taken that right away. The 'unless otherwise provided by law' language does not incorporate statutes in effect at the time of readjustment.

That language does not strengthen Franklin's position regarding the period of readjustment. What the court concluded was that the "unless otherwise provided" provision relates only to the Secretary's right to readjust. Here, the right to readjust has not been taken away. FCLAA sets forth new terms and conditions to be added to leases at the time of readjustment. In addition, at issue in that case were the royalty provisions. The court was not addressing the period of readjustment.

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fn. 1 (continued)
this provision was roundly criticized by public interest groups in their comments because they regarded it as an abrogation of authority. The Department's position is that while it is wholly lawful to readjust existing leases that were not readjusted on, or where notification of readjustment did not occur before, their anniversary dates, the Department will, beginning with June 1, 1980, assure timely and competent administration of leases by self-imposition of the sanction of waiver. This will guarantee accountability, and will prevent any future situation like that which prevailed with respect to lease readjustments during the early 1970's. On such leases, the notice whether the lease will be readjusted or not will be sent prior to the readjustment anniversary date, or the opportunity to readjust will be lost."
44 FR 42601-02 (July 19, 1979). Thus, the Department asserted it had authority to readjust leases even when the lessees were not notified at the 20-year anniversary date, and that such a policy would be applied to leases with anniversary dates between August 4, 1976, and June 1, 1980. Following the issuance of the Rosebud and Portland decisions, supra, the Department issued final rulemaking deleting 43 CFR 3451.1(b). 47 FR 33146 (July 30, 1982). That rulemaking did not, however, change the "current 20-year period" phrase in 43 CFR 3451.1(a)(1).

We conclude that the 10-year period of readjustment applies to a pre-FCLAA lease upon the expiration of its 20-year period following August 4, 1976, whether or not BLM has provided the lessee with timely notice of readjustment. This is consistent with the intent of Congress that pre-FCLAA leases be converted to 10-year readjustment periods. Because BLM failed to provide timely notice of readjustment in 1976, Franklin has escaped the imposition of new terms and conditions for a period of 10 years. BLM properly informed Franklin that its lease would be subject to readjustment in 1986.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

Anita Vogt
Administrative Judge
Alternate Member

John H. Kelly
Administrative Judge